



PUBLIC NOTICE

Federal Communications Commission
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Washington, D.C. 20554

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DA-01-2586

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 13, 2001

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. A public notice of these fee decisions is published in the FCC record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Airadigm Communications, Inc. – Request for waiver and deferral of the application fees associated with the filing of the waiver petition. **Dismissed** (April 24, 2001) [See 14 FCC Rcd 8017, Par. 39.]

Concert Global Networks USA, LLC – Request for waiver of late payment penalties on FY 2000 regulatory fees **Denied** (August 28, 2001) [See 47 USC 159(c)(1)]

Gateway Radio Works, Inc. – Request for waiver of the late charge penalty on late payment of FY 2000 regulatory fees. **Denied** (September 28, 2001) [See 47 USC 159(c)(1)]

Lockheed Martin Corporation and Lockheed Martin Global Telecommunications, Inc. – Request for reconsideration of a Managing director fee decision concerning payment of application fees. **Denied** (June 13, 2001) [See 47 USC 158(g)]

Mariner Broadcasters Inc. – Request for waiver of late payment penalties on FY 2000 regulatory fees **Denied** (September 28, 2001) [See 47 USC 159(c)(1)]

One-On-One Sports Radio – Request for waiver of late payment penalties on FY 1997 regulatory fees **Denied** (September 18, 2001) [See 47 CFR 1.1164 & 47 CFR 1.1164(b)]

Outward Bound School – Request for waiver/exemption of filing fees. **Denied** (September 28, 2001) [See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), Par. 54, FCC 91-298]

Pacific Gas and Electric Company - Request for waiver of application fees. **Granted** (October 1, 2001) [See 47 CFR Par. 1.1102 & 1.1117(e).]

Paging Network, Inc. – Request for waiver of application fees. **Granted** (June 6, 2001) [See Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 10 FCC Rcd 12759, 12762 (1995).]

Paging Network, Inc. – Request for waiver of the FY 2000 regulatory fees. **Granted** (June 6, 2001) [See Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 10 FCC Rcd 12759, 12762 (1995).]

Teletouch Licenses, Inc. – Request for reconsideration of a Managing director fee decision concerning underpayment of an application fee. **Denied** (July 24, 2001) [See 47 USC 158(g)]

Wireless World, L.L.C. - Request for a review of the February 5, 2001 decision regarding a refund of a filing fee. **Granted** (August 22, 2001) [See 47 CFR 1.1112]

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE REVENUE AND RECEIVABLES OPERATIONS GROUP AT (202) 418-1995.



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

memorandum

TO: Tom Putnam, OMD
Mark Reger, CFO

FROM: Paul K. Cascio, OGC

SUBJECT: In re Airadigm Communications, Inc., Contingent Emergency Petition for Reinstatement or in the Alternative for Waiver, Fee Control No. 00000-RRQG-00-013.

DATE: April 24, 2001

Mr. William S. Carnell, counsel for Airadigm Communications, Inc., submitted the subject Petition for Reinstatement or in the Alternative for Waiver (hereinafter, Petition) on February 7, 2000 (DA 00-368) (enclosure 1). On January 24, 2001, the Petition was submitted to us for review of the included request by Airadigm to waive "procedural filing requirements and/or fees as may be necessary to render th[e] petition appropriate for filing."¹ The issues presented were whether any fee was due,² if so, whether the petition requested a waiver of an application fee, whether the petitioner had properly requested a waiver, and whether petitioner submitted the correct form and documentation to support an express or implied request to waive the fee. Petitioner stated that it was experiencing financial hardship resulting from bankruptcy, and implied therein would be a basis for waiving the application fees.³ Mr. Carnell, however, did not append the requisite documentation.

On February 8, 2001, Mr. Carnell submitted a check⁴ for \$ [REDACTED] to pay the filing fee of [REDACTED] and late payment penalties of [REDACTED] (enclosure 2). By filing the fee, penalty, and required remittance form, Mr. Carnell mooted any express or implied request to waive the fees. Accordingly, we are returning the Petition to you without any action. The Commission is not required to provide a separate response to this fee question, and you may close out the entry at fee control number 00000-RRQG-00-013.

¹ Petition, fn 27 at page 13.

² In the alternative, the Petition may be construed as a request for declaratory ruling, which does not require an application fee.

³ *In re Mobilemedia Corporation, et al.*, 14 FCC Rcd 8017, para 39, citing *Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 10 FCC Rcd 12759, 12,762 (bankruptcy or receivership sufficient to establish financial hardship for purposes of regulatory fees.)

⁴ Mr. Carnell provided the required remittance form, FCC Form 159.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Airadigm Communications, Inc.)

Contingent Emergency Petition for)
Reinstatement of C and F Block PCS)
Licenses or for Partial Waiver of § 1.2110(f))
of the Commission's Rules)

File No.

**CONTINGENT EMERGENCY PETITION
FOR REINSTATEMENT OR IN THE ALTERNATIVE FOR WAIVER**

AIRADIGM COMMUNICATIONS, INC.

James F. Rogers 3215 2215
William S. Carnell
Latham & Watkins
1001 Pennsylvania Avenue, N.W., Suite 1300
Washington, DC 20004
(202) 637-2200

February 7, 2000

WAIVER - EXPEDITED ACTION REQUESTED

*Rec'd
Jan 24 2001*

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WAIVER – EXPEDITED ACTION REQUESTED¹

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
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**CONTINGENT EMERGENCY PETITION
FOR REINSTATEMENT OR IN THE ALTERNATIVE FOR WAIVER**

I. INTRODUCTION AND SUMMARY

Airadigm Communications, Inc., ("Airadigm") is a "very small business" that operates PCS systems in Wisconsin and Iowa, using entrepreneurs' block licenses it won at auction. After investing millions of dollars to build its network, Airadigm now provides service to roughly 20,000 subscribers, most of them in rural areas and many on the Oneida Nation's tribal lands. Many of Airadigm's subscribers use PCS to replace their landline service, and for others, Airadigm provides essential tribal, public safety, medical, or business communications. Even after filing a petition in bankruptcy, Airadigm has continued to serve these areas, develop

¹ Pursuant to the Commission's Rules, 47 CFR § 1.925(b)(4), Petitioner hereby requests expedited consideration. To grant this relief too late would be the same as denying it. Petitioner operates at a significant loss and will literally run out of money in a matter of months, and will need to take action in the bankruptcy court *before* it runs out of money. Furthermore, in order to continue operations at all, Petitioner needs to retain the confidence of postpetition lenders, suppliers, vendors, subscribers and employees. This confidence is likely to fade if there is prolonged uncertainty as to the status of Petitioner's licenses. Therefore, Petitioner requests that the Commission take final action on this petition within 30 days from the date it is filed.

its network, and attract new users, thanks to a new management team and a debtor-in-possession financing facility.²

Now, however, a previously unarticulated and unanticipated interpretation of the Communications Act and the Bankruptcy Code threatens to disrupt these essential and competitive services and to frustrate the legitimate expectations of creditors. Relying on a good-faith interpretation of the Bankruptcy Code, Airadigm did not (and indeed believed that it *could* not) make payments during the bankruptcy on its prepetition debt to the FCC. Now, in another proceeding, the FCC has announced that licenses “automatically cancel”—notwithstanding the licensee’s bankruptcy—on the expiration of the grace period, if payment is not made.³

Airadigm is in a unique position. It was the first C Block licensee (other than pioneer’s preference licensees) to begin providing service to the public. It built out and operated its network—and continues to do so—and made its full down payment and three installment payments. Regrettably, its overly ambitious business plans ultimately forced Airadigm to seek bankruptcy protection, but Airadigm is the only C Block licensee in bankruptcy that was in service prior to filing, or that is in service today. Even though other bankrupt C Block licensees could argue that they, too, thought that bankruptcy protected their licenses from cancellation, they could not assert the overwhelming public policy in favor of affording continuous service to the public. Moreover, unlike some C Block applicants who were unable to pay amounts due the

² Since July 28, 1999, Airadigm has been operating as a “debtor-in-possession,” under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §101 *et seq.* Airadigm’s Chapter 11 case (the “Bankruptcy Case”) is currently pending in the United States Bankruptcy Court for the Western District of Wisconsin. See *In re. Airadigm Communications, Inc.*, Case No. 99-33500 (Bankruptcy, W.D.Wi. 1999).

³ See, e.g., News Release, “FCC Informs Court That NextWave Licenses Have Cancelled and Sets Date for Auction,” (rel. Jan. 12, 2000), available at: <<http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek004.html>>.

Commission, Airadigm has never challenged the validity or the quantum of the FCC's claim or its regulatory authority, nor has Airadigm asserted that it needed more time to pay the Commission. Airadigm has during the Bankruptcy Case paid on a timely basis all of the obligations that it is allowed to pay while operating under Chapter 11 of the Bankruptcy Code.

If Airadigm's licenses automatically cancelled, Airadigm will be forced to cease providing service to the public.⁴ To cause Airadigm to turn off service to thousands of subscribers, most of whom are in rural areas or tribal lands, and many of whom rely on Airadigm as a total or partial landline substitute, would do violence to the public interest, and would violate the Commission's mandate as a regulator. Nor would application in this situation of this draconian penalty further any countervailing regulatory objective. Based on these extraordinary circumstances and on the overwhelming public interest, Airadigm requests that the Commission reinstate its licenses, to the extent that they have cancelled, or in the alternative grant a waiver *nunc pro tunc* of the automatic cancellation rule.

II. BACKGROUND

Airadigm Communications, Inc. is a very small business within the Commission's rules,⁵ the product of a joint venture controlled by Wisconsin Wireless Communications, Inc., itself a very small business, and owned 49% by the Oneida Enterprise Development Authority, a subsidiary of the Oneida Nation, a tribe of native Americans with lands in rural Wisconsin. Airadigm holds 15 PCS licenses: 11 C Block licenses in Wisconsin, as well as two C Block and two F Block licenses in Iowa (collectively, the "Licenses"). The overwhelming majority of

⁴ Nor would interim operating authority allow the continuation of service: As a lame duck licensee with no permanent spectrum assets, Airadigm would not be able to obtain financing to fund its significant operating losses, or to continue its network buildout.

⁵ See 47 CFR § 24.720(b)(2).

Airadigm's service territory is rural, including the tribal lands of the Oneida Nation. All of these licenses were obtained by Airadigm from the FCC at auction, and all were financed pursuant to the Commission's installment payment plan.

Airadigm bid a total of about \$71.5 million for its licenses, which cover territory including approximately 3.5 million residents. Airadigm timely met its down payment obligations on all of its licenses, paying over \$7 million to the FCC. Airadigm was one of the few C Block licensees to make its first installment payment before the Commission issued a blanket suspension of licensees' payment obligations, and after the Commission resumed the payment obligations, Airadigm made two additional installment payments before filing for bankruptcy. Airadigm did not elect any of the relief that the FCC offered to C Block licensees,⁶ because it was already providing service to the public and believed that it could not give up all or part of its spectrum holdings and still continue to provide the services that it sought to deliver. Including its down payments and its three installment payments, Airadigm has paid a total of approximately \$13 million to the FCC for its licenses.

In addition to its payments to the FCC, Airadigm has made substantial capital investments in its system. Airadigm was the first non-pioneer's preference licensee to begin offering service in the C Block. It has now built out a GSM network covering roughly a third of its licensed population. Rather than build out only the more urbanized areas within its licensed territory, Airadigm has at great cost sought to provide service to less-populated rural areas that have traditionally been underserved. For example, Airadigm is the only PCS provider in Wausau

⁶ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 97-82 (rel. Oct 16, 1997); *Order on Reconsideration of the Second Report and Order* (rel. Mar. 24, 1998).

and Stevens Point, and Airadigm provides coverage throughout all of the Oneida Nation's tribal lands, despite its relatively sparse population.

Airadigm has invested heavily to bring service to its markets, but has yet to generate positive cash flow. Airadigm's original business plan, seeking to capitalize on the high cost of wireline service in these relatively remote areas, was intended to provide an economical landline alternative: wireless local loop. This business plan required a massive investment in network equipment in order to guarantee the quality of service—particularly within buildings—that would induce businesses and consumers to rely on Airadigm as their primary or only telephone. As a result, Airadigm has to date spent over \$50 million to build out its network. In all, it has invested over \$190 million⁷ to bring service to these markets.

For various reasons, Airadigm ran into financial difficulty. Despite its early build-out and the quality of its service, its early penetration was somewhat disappointing—around two percent of covered pops. Furthermore, subscriber revenues fell short of predictions. In sum, despite its vigorous efforts to provide new and innovative service to the public, Airadigm's original business plan did not work out. Thus, in July, 1999, Airadigm filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

Robert Galle, a "turn-around" specialist with the firm of Grisanti, Galf & Goldress, Inc., was hired as Chief Executive Officer at about the same time that Airadigm filed for bankruptcy. Mr. Galle proceeded to reorganize or replace much of Airadigm's management, to trim its operating costs and to increase its revenues. Airadigm now adds, on a net basis, approximately 750 additional subscribers every month. From a net monthly cash loss from

⁷ This figure includes liabilities and original equity.

operations (before debt service) of roughly \$1 million when the bankruptcy was filed. Airadigm now loses roughly \$500,000 per month.

Pursuant to §362(a) of the Bankruptcy Code,⁸ the filing of Airadigm's petition for Chapter 11 relief on July 28, 1999 resulted in the immediate imposition of an "automatic stay" of, among other things, any actions to recover any claims against Airadigm that arose prior to July 28, 1999. In accordance with the automatic stay, and well-established principles of bankruptcy law, Airadigm has not made any post-bankruptcy payments on any of its prepetition debt obligations since July 28, 1999, which obligations include the amounts owed to the FCC, as well as over \$100 million owed to other secured creditors.⁹ Indeed, as one bankruptcy court pointed out, Airadigm could not have paid the FCC without a specific order from the court: "the pre-petition claims of all creditors, whether coming due pre- or post-petition, get paid only by court order or with a court-confirmed plan of reorganization."¹⁰ Shortly after the Bankruptcy Case was filed, after notice to creditors (including the FCC), Airadigm obtained a \$5 million "debtor-in-possession" financing facility to enable it to continue post-petition operations and to pay the post-petition claims that it is entitled to pay under the Bankruptcy Code.

Despite the apparent litigation success of certain other bankrupt C Block licensees, Airadigm has consciously eschewed litigation against the FCC. Rather, Airadigm consistently has sought to work cooperatively with the FCC (and its other creditors) to achieve a consensual regulatory solution. To date, Airadigm has taken no action in the Bankruptcy Case to

⁸ 11 U.S.C. § 362(a).

⁹ There can be no doubt that the obligation to pay the FCC arose prepetition. Indeed, the FCC has long maintained, and the U.S. Court of Appeals for the Second Circuit recently agreed, that "the entire obligation became due at the close of the C-Block auction." *In re. Nextwave Personal Communications, Inc.*, 1999 WL 1267039, *5, *13 (2nd Cir. December 22, 1999).

challenge or impair the Commission's claim or its regulatory authority. Nor has the Commission taken any action in the Bankruptcy Case to challenge Airadigm's ability to continue to operate, nor has it ever alleged that its security interests in the licenses were not "adequately protected" within the meaning of the Bankruptcy Code.¹¹

Over the past six months, Airadigm and its principal creditors have explored a number of avenues to restructure the business in a way that would allow it to complete its bankruptcy reorganization. To this end, for a time Airadigm engaged in extensive negotiations with the Commission about the return of a portion of Airadigm's spectrum in return for partial debt reduction, consistent with the Commission's C Block restructuring orders. Having explored various options, Airadigm ultimately determined that its best course would be to find a strategic partner to inject new financing and fund operations, and to provide operational assistance. Airadigm therefore solicited bids from a number of industry participants and has entered into a letter of intent to sell its assets to a "designated entity," subject to the approval of the Commission and the Bankruptcy Court.¹² That entity, RW Acquisition, has indicated to Airadigm that it will not interrupt service to existing subscribers, and that it will continue to

¹⁰ *In re. Nextwave Personal Communications, Inc., Decision on Motion to Enforce Automatic Stay*, at 39, No. 98 B 21529 (Bankruptcy, S.D.N.Y., Jan. 31, 2000).

¹¹ The point of this Petition is to seek regulatory relief and avoid litigation. It must be noted, however, that nothing herein is intended to waive or impair any arguments or defenses that Airadigm or its creditors may have with respect to the effect of applicable bankruptcy law in the Bankruptcy Case, all of which rights are expressly reserved. Indeed, as a debtor-in-possession, Airadigm is *unable* to waive or modify unilaterally the effect of the automatic stay, which can only be modified by the bankruptcy court after notice to creditors and an opportunity for a hearing. See 11 U.S.C. §363 and Bankruptcy Rule 4001.

¹² The Commission has separately been provided with a copy of Airadigm's proposed Disclosure Statement and Plan of Reorganization, which was filed on January 24, 2000 pursuant to §1125 of the Bankruptcy Code as well as a Motion For Approval Of Terms Of Letter Of Intent And Request For Expedited Hearing ("Sale Motion"), which was also filed on January 24, 2000 and is scheduled for hearing on February 7, 2000. Airadigm's proposed Plan of Reorganization provides that all of Airadigm's existing equity will be extinguished, and that the debt owed the FCC will be "unimpaired" – a term of art under the Bankruptcy Code that essentially means that the FCC shall be returned to the position in which it would have been had there been no default or bankruptcy. See 11 U.S.C. § 1124.

invest in and build out the markets covered by Airadigm's licenses, providing the service to rural and remote areas that has been such an important part of Airadigm's business plan.

On December 22, 1999, the U.S. Court of Appeals for the Second Circuit issued an opinion in *In re Nextwave*,¹³ reaffirming the FCC's regulatory authority over bankrupt licensees. On January 12, 2000, the Commission released a Public Notice declaring that Nextwave's licenses had automatically cancelled and would be reaucted. In late January, 2000, counsel for the Commission indicated informally to counsel for Airadigm that the Commission would take the position that Airadigm's licenses, like Nextwave's, were subject to automatic cancellation.

This was the first time the Commission had ever articulated that position to Airadigm (and the January 12 Public Notice was the first that Airadigm had heard it articulated in any quarter). The Commission never warned Airadigm that, notwithstanding the automatic stay and the moratorium on Airadigm's payment of prepetition debts, if it failed to make payment, its licenses would cancel. Airadigm arranged its DIP financing to provide it with sufficient liquidity to continue to operate its system, hire and retain employees, and make capital expenditures to expand its network, but it did nothing to arrange to make what would have been (at least prior to January 12, 2000) unprecedented and impermissible payments to the FCC.¹⁴

The purpose of this petition is not to dispute the merits of this issue, or to argue bankruptcy law to the Commission. Notwithstanding the position that Airadigm believes is

¹³ *In re Nextwave Personal Communications Inc.*, 1999 WL 1267039 (2d Cir. 1999).

¹⁴ "Had the FCC ever made [Airadigm] aware that it stood ready to enforce cancellation of [Airadigm's] principal assets, [Airadigm] could have applied to the bankruptcy court under Section 363 of the Bankruptcy Code, or possibly even under Section 105 under the necessity of payment doctrine, or [Airadigm] could have attempted to arrange DIP financing to pay the amounts and sought approval under Section 364. But the FCC never did so." Cf. *In re Nextwave Personal Communications Inc.*, *Decision on Motion to Enforce the Automatic Stay* at 31, No. 98 B 21529, (Bankruptcy, S.D.N.Y., January 31, 2000).

mandated by the overwhelming weight of authority, it would strongly prefer to avoid becoming embroiled in litigation with the FCC over the effect of the automatic stay or other applicable law on its interest payment obligations to the FCC. Thus, Airadigm appeals to the FCC not as a creditor in bankruptcy but as a regulator charged with pursuing the public interest.

Enforcement of automatic cancellation would necessarily terminate service to thousands of subscribers. If Airadigm has no licenses, it has no authority to use the radio spectrum necessary to operate a PCS system and it must cease operating.¹⁵ Furthermore, even if the Commission were to grant Airadigm interim operating authority, it still would be financially unable to continue operations: lenders or investors will not fund the heavy losses that a PCS system incurs in its early years without the long-term return on investment made possible by a full license term.

The Commission should seek to avoid this unnecessary termination of service. Even if the Commission's interpretation of the Bankruptcy Code as articulated in *Nexwave* is correct, it should exercise its regulatory powers to ensure that Airadigm is not forced to discontinue service to thousands of subscribers and cause millions of dollars of loss to its creditors, a result manifestly contrary to the public interest. Airadigm hereby petitions the Commission for reinstatement of its licenses—to the extent that they have automatically cancelled—or alternatively for a waiver *nunc pro tunc* of Section 1.2110(f) of the Commission's rules.

Request

¹⁵ Airadigm notes that even today it is far from clear that the automatic stay covers the installment payments due the FCC, and thus whether the automatic cancellation provisions of the Commission's rules could have taken effect. In fact, there is strong authority for Airadigm's position that it need not and could not have made interest payments during the bankruptcy on its prepetition debt to the FCC. See generally *Decision on Motion to Enforce the Automatic Stay*.

III. THE COMMISSION SHOULD REINSTATE AIRADIGM'S LICENSES, TO THE EXTENT THEY HAVE CANCELLED

There is no specific provision of the Commission's rules that provides for reinstatement of PCS licenses that have automatically cancelled due to nonpayment. Nor is there any rule that prohibits such reinstatement. In the absence of such a prohibition, the Commission has ample authority to grant reinstatement, and its general obligation to further the public interest, convenience and necessity¹⁶ requires it to do so here.

The Commission's power to implement the Communications Act is plenary,¹⁷ and its authority to regulate the use of the electromagnetic spectrum beyond question.¹⁸ This power includes the authority to grant, revoke, and modify licenses and permits.¹⁹ The Commission has repeatedly recognized that the power delegated to it by the Act embraces the authority to reinstate licenses and permits, for it has repeatedly codified its ability to do so in numerous sections of the rules.²⁰

The unifying theme of the Commission's determination to reinstate a license or permit is, in keeping with the Act's command, whether the public interest, convenience and necessity would be served by reinstatement. As set forth below, the public interest, convenience and necessity compels reinstatement here. It would work a grave disservice to the public interest

¹⁶ Communications Act of 1934, as amended (the "Act"), Section 303, 47 U.S.C. § 303.

¹⁷ See, e.g., Section 4(i) of the Act, 47 U.S.C. § 154(i): "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

¹⁸ See, e.g., 47 U.S.C. § 303.

¹⁹ See generally Part I of Title III of the Act, 47 U.S.C. §§ 301-337.

²⁰ See, e.g., 47 C.F.R. § 21.44 (b) ("A license forfeited in whole or in part under the provisions of paragraph (a)(1) or (a)(2) may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity"); 47 C.F.R. § 24.843(a) ("Within 30 days after the authorization may be filed on FCC Form 489"); 47 C.F.R. § 25.163(a) ("A station may be reinstated if the

to interrupt the provision of PCS service to existing subscribers, particularly in the relatively underserved rural areas and tribal lands that comprise so much of Airadigm's subscriber base, and especially given the businesses and public safety and medical institutions that have relied upon Airadigm's service, which in some places is the only PCS service available. Competition would be needlessly injured, creditors unfairly impaired, and, most of all, users deprived of needed service. The public interest would be gravely disserved by allowing Airadigm's licenses to cancel.

In some cases, the Commission's rules impose additional procedural requirements for reinstatement. Such requirements—though not directly applicable—would be met here. These requirements generally arise out of a licensee's failure to file a renewal application before expiration of a permit or license. In such cases, the reinstatement request must be filed within a certain period (typically thirty days) after the action or inaction, and provide an explanation of the reason for late filing and the procedures the licensee has implemented to ensure that the late filing will not occur again.²¹ Although there is no such requirement applicable here, Airadigm satisfies any such general tests: It has acted promptly and diligently (and within less than thirty days) after the Commission's first utterance in any proceeding that nonpayment of an installment payment could lead to automatic cancellation, and before any statement—let alone adjudication—in Airadigm's case to that effect.²² It has explained the reason for its nonpayment.

Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity").

²¹ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11145, 11154-55 (1999).

²² If it is ultimately determined that the automatic cancellation provisions were not stayed by the automatic stay, the cancellation would have occurred many months ago, but the doctrine of equitable tolling would not permit the Commission to charge Airadigm with a duty to file a reinstatement at a time when no one knew that automatic

And upon its reorganization, it will be able—indeed it will be obligated—to ensure that all past-due amounts owed to the FCC are brought current and all future payments are made in a timely fashion.

Although there is no rule specifically addressing reinstatement of a PCS license for failure to make timely payment of an installment, there is a provision for reinstatement of PCS licenses in another rule that provides for “automatic” expiration and thus is even more directly analogous than the renewal application reinstatement provisions discussed above. Section 24.843(a),²³ after providing that if construction is not completed within the applicable time period the authorization will automatically expire, states as follows: “Within 30 days after the authorization expires an application for reinstatement may be filed.” The rule does not provide any standard for Commission consideration of a reinstatement request under that section, but it does state that a request for an extension of time, filed before the “automatic expiration,” would be granted if due to reasons beyond the control of the licensee. In analogous circumstances the Commission has found mere *legal uncertainty*—where “policy remains in limbo”—to be a circumstance beyond the control of the licensee, and thus granted relief “to avoid the manifest unfairness that would result from requiring a permittee to make further expenditures and continue construction efforts where its permit could be subsequently

✓ cancellation had taken place, its licenses remained on the Commission’s official database, and the Commission itself condoned Airadigm’s continued operation. *Cf., e.g., Cinciarelli v. Reagan*, 729 F.2d 801, 807-8 (D.C. Cir. 1984).

²³ The very existence of this rule undercuts any notion that Section 309(j) of the Act, 47 U.S.C. § 309(j) (which requires the Commission to grant PCS licenses by competitive bidding) somehow prevents the Commission from reinstating licenses that have automatically expired or cancelled. The subsection simply requires the award of licenses to be made in a particular fashion, and would apply to the relicensing of the spectrum in the event the Commission were not to reinstate. It in no way curtails the Commission’s ability to determine whether licenses should be reinstated. That determination should be similar across services, whether initially awarded by auction, lottery, or comparative hearing.

cancelled.”²⁴ Similarly, the D.C. Circuit recognized the need for relief where “uncertainty is due to inaction by the Commission.”²⁵ Applying these general principles and the teaching of the D.C. Circuit, Airadigm’s failure to pay should be excused where the relevant FCC policy “remains in limbo.”²⁶

Airadigm need not argue, however, that this basis alone justifies reinstatement: it merely provides the foundation for its request. That is, these factors—that Airadigm’s mistake (if any) was inadvertent, was due to legal uncertainty beyond its control, and was promptly remedied—need not by themselves entitle Airadigm to reinstatement. As discussed below, reinstatement would serve the public interest: applying the statutory standard of “the public interest, convenience, and necessity” establishes that Airadigm uniquely qualifies for reinstatement, so that the excusable failure to make timely payment will not lead to disruption of service to the public nor work a hardship on Airadigm’s innocent creditors.

IV. WAIVER UNDER THESE CIRCUMSTANCES IS CONSISTENT WITH COMMISSION PRECEDENT

In the alternative, Airadigm is entitled to a waiver, *nunc pro tunc*, of the Commission’s rules calling for default and cancellation upon missed installment payments. For the Commission has often granted waivers based on mistakes less excusable than Airadigm’s.²⁷

²⁴ *California State University, Sacramento*, FCC 98-215 (September 14, 1998), ¶ 13 (citing *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1970)).

²⁵ *Channel 16 of Rhode Island*, 440 F.2d at 276.

²⁶ *Cf. California State University*, FCC 98-215 at ¶ 13.

²⁷ Airadigm hereby seeks such waivers of procedural filing requirements and/or fees as may be necessary to render this petition appropriate for filing. The unique nature of this situation makes it difficult to conform this petition for relief to the Commission’s procedural rules: for example, insofar as an application must be submitted through the Commission’s Universal Licensing System, the ULS system would likely not accept an application by Airadigm to “reinstate” licenses that already appear within the ULS system as belonging to Airadigm.

By regulation, the Commission may waive its rules where, "in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest."²⁸ Courts have emphasized that such fact-specific waivers are necessary to the proper exercise of regulatory authority. "The agency's discretion to proceed in difficult areas though general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."²⁹ While the Commission may establish rules of general application, it retains "an obligation to seek out the 'public interest' in particular, individualized cases."³⁰ Although the fixed rule may ultimately prevail, the regulating agency must take a "hard look" at the circumstances presented by a waiver petition, and articulate the reasons for its action.³¹ The Commission has previously waived payment deadlines—or the consequences of missing such deadlines—when a licensee's failure to pay was due to inadvertence or mistake. Having allowed such exceptions, the Commission cannot "arbitrarily waive[] a deadline in one case but not in another."³² The Commission's precedent dictates that Airadigm should receive the requested waiver—but not necessarily that other bankrupt C Block licensees should be entitled to such relief.

In the cases collectively known as the *Default Waiver Orders*,³³ the Commission was presented with auction winners who for various reasons had missed their down payments.

²⁸ 47 CFR § 1.925(b)(3)(ii).

²⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

³⁰ *Id.* at 1157.

³¹ See, e.g., *BellSouth Corp. v. FCC*, 162 F.2d 1215, 1224-25 (D.C. Cir. 1999).

³² *Green County Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985).

³³ See *AMK International, Inc.*, 12 FCC Rcd 1511 (WTB 1997); *Cenkan Towers, L.L.C.*, 12 FCC Rcd 1516 (WTB 1997); *Electronic SMR Communication Services*, 12 FCC Rcd 1520 (WTB 1997); *Independence Excavating*,

According to the Commission's rules, failure to make a timely down payment was cause for immediate default: the defaulting bidder would forfeit the license and would be subject to substantial default payments.³⁴ Nevertheless, the Commission waived its payment rules in over a dozen cases. In one case, for example, the company's president had a death in the family, and then was away at the PCS '96 conference and therefore did not notice when the payment became due.³⁵ In another case, the bidder's accountant miscalculated the amount due to the Commission.³⁶ One bidder was simply unaware that the Public Notice had issued that triggered its payment obligation,³⁷ while another assumed that payment information would be posted on the FCC's on-line Bulletin Board System.³⁸ Thus, the Commission granted waivers based on a variety of bidder mistakes.

The one circumstance where the Commission refused to allow a waiver was where the bidder had not obtained financing. In order for the auction market to work efficiently, the Commission reasoned, unfinanced and therefore speculative bidding should be eliminated to the extent possible. It thus sought to "discourag[e] insincere bidders from winning licenses solely with the expectation that they can 'shop' their licenses post-auction in a late effort to

³⁴ *Inc.*, 12 FCC Rcd 1524 (WTB 1997); *Hickory Telephone Company, Inc.*, 12 FCC Rcd 1528 (WTB 1997); *The Wireless, Inc.*, 12 FCC Rcd 1821 (WTB 1997); *Roberts-Roberts & Associates, LLC*, 12 FCC Rcd 1825 (WTB 1997); *Southern Communications Systems, Inc.*, 12 FCC Rcd 1532 (WTB 1997); *RFW, Inc.*, 12 FCC Rcd 1536 (WTB 1997); *MFRI, Inc.*, 12 FCC Rcd 1540 (WTB 1997); *Wireless Telecommunications Company*, 12 FCC Rcd 1544 (WTB 1997); *CSS Communications, Co.*, 12 FCC Rcd 1507 (WTB 1997); *Longstreet Communications International, Inc.*, 12 FCC Rcd 1549 (WTB 1997).

³⁴ See 47 CFR § 24.711(a)(2); See also *Mountain Solutions Ltd., Emergency Petition for Waiver*, 13 FCC Rcd. 21983 (1998).

³⁵ See *Wireless Telecommunications Co.*, 12 FCC Rcd at 1544.

³⁶ See *Roberts-Roberts Assoc.*, 12 FCC Rcd at 1825.

³⁷ See *Southern Communications*, 12 FCC Rcd. at 1532.

³⁸ See *AMK*, 12 FCC Rcd. at 1513.

obtain financing.”³⁹ It also stressed the particular importance of the down payment as an early warning device—“to ensure the financial viability of a license winner and to provide an indication as to the capability of the winning bidder to actually build out its system.”⁴⁰ The Commission therefore refused to waive the payment deadline based on the bidder’s inability to obtain financing.⁴¹ Airadigm paid its down payment in full when due, so the holding of the *Default Waiver Orders*—that failure to make the down payment in timely fashion indicates that the licensee is more likely to put the licenses in to productive use—is simply not relevant.

Airadigm’s error (to the extent that it was an error) was purely a mistake, and did not implicate its ability to obtain financing or build its system. Airadigm believed that during the pendency of its bankruptcy, it need not—and indeed, under the bankruptcy law, could not—make interest payments to the FCC as they came due under the terms of its notes. In formulating this belief, Airadigm relied on two well-established principles of bankruptcy law: The first, codified in Section 362, which by its terms is “applicable to all entities,” stays the enforcement of any prepetition claim against the debtor.⁴² The second, codified in Section 363, actually *prohibits* a debtor-in-possession from making payments on any prepetition obligations outside of

³⁹ *Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline*, 12 FCC Rcd. 17987, 17991 (1997).

⁴⁰ *Mountain Solutions*, 13 FCC Rcd. at 21993.

⁴¹ The Commission’s reasoning was upheld in *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999).

⁴² See 11 U.S.C. § 362(a). When Congress enacted this latest version of the Code, the legislative history stated:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in Collier on Bankruptcy*, App. Pt. 4(d)(i).

a court order or a confirmed plan of reorganization.⁴³ Until January 12, 2000, the FCC never disputed this interpretation.⁴⁴ Airadigm's interpretation is consistent with the interpretation of the only federal court directly to have reached this issue.⁴⁵ In its reliance on a reasonable interpretation of a federal statute, Airadigm's mistake—to the extent it was mistaken—would seem far more excusable than the “didn't see the public notice” variety.

Furthermore, the Commission never attempted to correct Airadigm's alleged mistake. The Commission knew that Airadigm believed that its pending bankruptcy relieved it of the obligation to make interest payments as they came due on the FCC notes. Yet the Commission never asserted that the payments were due, notwithstanding the bankruptcy, and in fact has never asserted that Airadigm's licenses have cancelled. Airadigm's failure to pay, made under the assumption that its payment obligations were suspended by operation of Bankruptcy Code, cannot be characterized as anything worse than inadvertence or excusable neglect.

This case is totally unlike *Mountain Solutions*, or any other case where the bidder was unable to pay. Since it filed for bankruptcy, Airadigm has paid all of its current obligations—that is, all of the obligations it understood to be current—as they came due. Airadigm obtained debtor-in-possession financing in excess of \$5 million, and paid out that money in accordance with its (and its creditors') understanding of its payment obligations. There is absolutely no evidence that Airadigm would not have sought and obtained the requisite bankruptcy court authority and additional debtor-in-possession financing to make payments to the FCC as necessary to maintain the licenses on which Airadigm's reorganization depends.

⁴³ See 11 U.S.C. § 363.

⁴⁴ The issue in the *Nexwave* litigation was whether the full amount of the FCC's debt was enforceable against that debtor, and appeared never to question the applicability of the automatic stay.

This is not a case where the alleged defaulter was *unable* to pay. Here, as in the *Default Waiver Orders*, the alleged defaulter was *unaware* that it *needed* to pay.

Again, however, the innocence of Airadigm's alleged mistake is only half the equation. Airadigm's alleged mistake was purely due to inadvertence, and was more understandable than many of the mistakes that the Commission has waived. But the Commission need not grant relief on that basis alone. As detailed below, Airadigm is entitled to a waiver because such a waiver would be overwhelmingly in the public interest. The Commission need not grant similar waivers to every licensee that, like Airadigm, relied on an interpretation of the law contrary to that which the Commission has now propounded in another case. What makes Airadigm's situation unique is the overwhelming public interest in favor of relief.

V. CANCELING THE LICENSES WOULD BE AGAINST THE PUBLIC INTEREST

As discussed above, Airadigm meets the technical standards for either reinstatement or waiver, *nunc pro tunc*, of the cancellation rules. Airadigm innocently relied on what appeared to be the prevailing view that bankruptcy stayed its obligation to make interest payments to the FCC. But Airadigm's claim to relief stems only in part from having complied with the Commission's reinstatement and waiver precedents. Rather, Airadigm's claim to either form of relief stems from the massive detriment to the public interest that would result from canceling its licenses—a detriment that would have no countervailing benefit whatsoever.

A. Cancellation would interrupt service

⁴⁵ Cf. *In re Nextwave Personal Communications Inc.*, Decision on Motion to Enforce the Automatic Stay, No. 98 B 21529, (S.D.N.Y., January 31, 2000).

If the Commission allows these licenses to cancel, thousands of subscribers will lose service.⁴⁶ Unlike any other bankrupt C Block licensee, Airadigm provides service to the public, and has for several years. Airadigm was the first non-pioneer's preference licensee to begin offering service in the C Block. In just three years, Airadigm has built out its network to cover over a million people, about a third of its licensed population. But most important, Airadigm currently provides service to roughly 20,000 subscribers.

Almost all of Airadigm's service area is rural, and fully three-quarters of its subscribers live in rural areas. Much of Airadigm's service area is underserved. For example, Airadigm is the only PCS service available in Wausau and Stevens Point. Moreover, Airadigm provides service to the Oneida Nation's tribal lands, and offers 100% coverage of the Oneida tribal lands. Airadigm also offers a unique service plan specifically designed to increase penetration among the Oneida. Members of the Tribe receive a rate of ten cents per minute with no recurring monthly charges—so someone who talks for twenty minutes receives a bill for two dollars. A significant percentage of Airadigm's subscribers are members of the Oneida Nation.

The Oneida tribal government makes extensive use of Airadigm's service. The tribal police force uses Airadigm for its mobile telecommunications. Likewise, officers of the tribal government use Airadigm telephones extensively; for many, Airadigm provides their primary means of communication. Mobile telephones are particularly well-suited to the conduct

⁴⁶ As a practical matter, the Commission could not avoid this service interruption by canceling the licenses but granting Airadigm an interim operating authority. Airadigm incurs monthly operating losses of roughly \$500,000, which are financed by its creditors. The only reason creditors fund such near-term losses is that they believe that there will be a long-term payoff. Without its licenses, Airadigm could never produce a long-term payoff. Airadigm's creditors are therefore highly unlikely to continue to fund its operating losses (under an interim authority or otherwise) if the licenses are cancelled. The D.C. Circuit recognized a similar principle in *La Star v. FCC*, 899 F.2d 1233, 1236 (D.C. Cir. 1990). In *La Star*, the Commission found it that it was necessary to ensure that some operator would provide interim service until a license could be reallocated. The court recognized that no business would volunteer to invest money in a wireless system where there is no

of tribal business, which often involves site meetings and extensive travel. The Commission has specifically recognized the problems inherent in providing service to rural areas and tribal lands, and is currently involved in several initiatives designed to promote service in such areas.⁴⁷ It would do a grave disservice to the public, and to the Commission's own policies, to cancel Airadigm's service to these areas.

A number of private users rely on Airadigm for wireless local loop. The exact number of residential subscribers who use Airadigm as their only telephone is unknown but is estimated to be significant. Fourteen businesses are known to use Airadigm as a *total* landline replacement.⁴⁸ Among those, three are very sizable, using over three hundred handsets each. Many more businesses have introduced Airadigm as a partial landline substitute, for example using wireless telephones for workers who tend to roam around the office or facility, and wireline for those whose jobs keep them in one place.

Several health care providers subscribe to Airadigm's service as a partial landline substitute. Four hospitals, three nursing homes and one medical clinic have specific arrangements with Airadigm to provide this service, including on-site base stations or other facilities. At St. Mary's Hospital in Madison, for example, the critical care nurses all carry Airadigm phones while on duty, which allow them instantly to call for help from anywhere inside or outside the hospital, or to be summoned from anywhere when an urgent situation arises.

certainty that it would retain the system permanently: "there is no indication that anyone is willing to set up a cellular telephone system only to be displaced when a permanent licensee is chosen." 899 F.2d at 1236.

⁴⁷ See, e.g., Extending Wireless Telecommunications Services to Tribal Lands, *Notice of Proposed Rulemaking*, WT Docket 99-266 (Rel. Aug. 18, 1999); see also, e.g., Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved, Tribal, and Insular Areas, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 99-204 (rel. Sept. 3, 1999).

⁴⁸ These businesses may still use wirelines for data and facsimile transmissions, and may have limited "emergency backup" wireline telephony.

Airadigm has installed two base stations at St. Mary's Hospital, and St. Mary's uses over 100 handsets.

To force Airadigm to turn off service to these thousands of individuals and businesses would be antithetical to the Commission's mandate to "encourage the provision of new technologies and services to the public."⁴⁹ It is well recognized that, "Commission policy strongly favors continuity of service."⁵⁰ Even in the face of significant misconduct, the Commission has allowed admitted malfeasors to continue operations in order to avoid interrupting service. For example, in *Liberty Cable*,⁵¹ a cable operator admitted in federal court that it had provided unfranchised cable service to twelve pairs of buildings, and admitted to the Commission that it had operated nineteen unauthorized microwave facilities. Nevertheless, the Commission allowed the operator to continue service in order to promote competition and to prevent a loss of service to existing customers.⁵² Likewise, in *La Star Cellular Telephone Co. v. FCC*,⁵³ the D.C. Circuit upheld the FCC's determination that the termination of cellular service by an existing provider "would have a severe and immediate impact on [existing] customers."⁵⁴ The court in *La Star* noted the impact that any discontinuation would have on the provider's immediate customers, and also on the marketplace as a whole, by reducing competition.⁵⁵ Here,

⁴⁹ 47 U.S.C. § 157(a).

⁵⁰ *PanAmSat Corp. Emergency Request for Temporary Authority to Operate Galaxy VI*, 13 FCC Rcd 11894, 11895 (1998).

⁵¹ *Application of Liberty Cable Co., Inc. For Private Operational Fixed Microwave Service*, 11 FCC Rcd. 14133 (1996).

⁵² *Id.* at 14140.

⁵³ *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233 (D.C. Cir. 1990)

⁵⁴ *Id.* at 1235.

⁵⁵ *Id.*